UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 175

Docket No. AT-0752-08-0640-I-1

William Calvin Little,

Appellant,

v.

Department of Transportation,

Agency.

August 31, 2009

Elaine L. Fitch, Esquire, Washington, D.C., for the appellant.

Randy Hyman, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board upon the appellant's petition for review (PFR) of an initial decision that sustained several misconduct charges against him and affirmed the demotion penalty. For the reasons set forth below, we GRANT the appellant's PFR, and we AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant, a Supervisory Air Traffic Control Specialist, was demoted to an Air Traffic Control Specialist, effective September 30, 2007, based on several charges of misconduct. *See* Initial Appeal File (IAF), Tab 7, subtabs 4a (notice

of proposed demotion), 4c (notice of decision), 4d (demotion SF-50). The appellant filed an equal employment opportunity (EEO) complaint, and this investigation was completed on May 16, 2008. IAF, Tab 6, Exhibit 5; *see* IAF, Tab 7, subtab 3 (Report of Investigation). The appellant later filed this appeal. IAF, Tab 1. A hearing was held on January 6, 2009. Hearing Transcript (HT). After the hearing, the appellant identified a purported comparator, Jose Irizarry, whom the agency proposed to suspend for 30 days based on similar misconduct, and he alleged disparate treatment based on race. IAF, Tabs 17, 20; *see* IAF, Tab 18 at 3-5 (January 13, 2009 proposal notice to Mr. Irizarry). Apparently, during a conference call with the parties, the administrative judge reopened the record to accept such evidence. IAF, Tab 18 at 2; IAF, Tab 22 at 6. The administrative judge issued an initial decision, sustaining all three misconduct charges, rejecting the appellant's race discrimination claim and affirming the demotion penalty. IAF, Tab 22. The appellant filed a PFR and the agency filed a response. Petition for Review File (PFRF), Tabs 1, 3.

ANALYSIS

The Charges and Specifications.

¶3 The appellant's demotion was based on three charges: (1) absence without leave (AWOL) (1 specification); (2) conduct unbecoming a manager (7 specifications); and (3) lack of candor in connection with an official inquiry (2 specifications). IAF, Tab 7, subtab 4a at 1-4. The agency bears the burden of proof by preponderant evidence with respect to the reasons for the demotion. 5 C.F.R. § 1201.56(a)(1)(ii).

¶4 There are two issues that we wish to address at the outset. First, we note that the initial decision is conclusory, and the administrative judge's decision to sustain the charges and specifications appears to be based largely on his credibility determinations. *See, e.g.*, IAF, Tab 22 at 3 ("Appellant's claim that he had no intention of submitting inaccurate records and his attempted rebuttal of

the AWOL charge are simply not credible."), 5 ("Under the circumstances, and given my prior findings concerning appellant's credibility, I find that [specification 1 of Charge 3] is sustained."). To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). The Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). Where, as here, an administrative judge has heard live testimony, his credibility determinations must be deemed to be at least implicitly based upon the demeanor of the witnesses. *Aldridge v. Department of Agriculture*, 2009 MSPB 146, ¶ 11.

¶5 Second, we note that the appellant originally denied most of the allegations in the demotion notice. *See* IAF, Tab 7, subtab 4b (the appellant's June 22, 2007 response). However, the appellant testified that deciding official Miles Richard Miller told him that if he admitted the allegations in a new written statement, he would get a 10-day suspension and possible ODP (Opportunity to Demonstrate Performance). HT (appellant) at 159-60. Mr. Miller verified that they had a conversation in which he told the appellant that if he admitted to the allegations and was remorseful, Mr. Miller would consider giving the appellant a 10-day

suspension and an ODP. HT (Miller) at 100-02. As a result of this conversation, on April 20, 2007, the appellant submitted the following statement:

> First of all I would like to apologize to Mr. Miller, Greg Bing [the appellant's first-line supervisor], and fellow supervisors for all the trouble that I have caused. I made several mistakes and disappointed a lot of people. The statement that was made was uncalled for. Getting credit time on position and not being there was unfair to others. FAM trips are a privilege and I abused it. I have learned from my mistakes and would greatly appreciate an opportunity to prove it. All I can do is ask for a chance and accept any discipline that would resolve this issue so we can move. You will not be disappointed.

IAF, Tab 7, subtab 3 at 88. We note that the appellant has not challenged the accuracy of these admissions. Despite this statement, Mr. Miller decided that the appellant was not remorseful enough and imposed a demotion instead. *See* HT (Miller) at 101-07, 118 ("I had no reason to believe what he wrote in that [April 20, 2007] Statement to be correct and that he would have changed his personal being."); HT (appellant) at 161. With this background, we will address the charges.

The administrative judge properly sustained the AWOL charge.

¶6 In order for an agency to prove AWOL, the agency must show that the employee was absent, and that his absence was not authorized, or that his request for leave was properly denied. *Wesley v. U.S. Postal Service*, 94 M.S.P.R. 277, ¶ 14 (2003). The agency alleged that, on February 21, 2007, the appellant was supposed to report for familiarization (FAM) training from 11:00 a.m. to 2:00 p.m.; however, he never went to the tower as assigned, and later claimed that his wife called, told him his daughter was sick, and he went to pick up his daughter. *See* IAF, Tab 7, subtab 4a at 1. The appellant was placed on AWOL status for that 3-hour time period because he failed to advise his supervisor that he would be unable to attend training or that he would be absent from work. *Id.* The appellant testified that he originally scheduled annual leave for that date, he had to get assistance to change his leave back to official duty in the agency's Cru Art

System (the agency's time-keeping system) so that he could attend the FAM training, but when he received the call from his wife, he claimed that he changed his leave back to annual leave and then left the office. HT (appellant) at 147-49. He further testified that when he left the office on that date, he was under the impression that his time was coded correctly. *Id.* at 148. The appellant admitted, however, that he did not tell his supervisor that he had to leave before he left the office that day, and did not tell his supervisor that he had not attended the FAM training when he returned to work. *Id.* at 148-49. The agency's attendance records show that on February 21, 2007, from 11:00 a.m. to 2:00 p.m., the appellant was not on annual leave, but rather, that he was at an offsite management training. *See* IAF, Tab 7, subtab 4l. Upon the appellant's return to the office, he never requested annual leave for that date, even after Mr. Bing brought to his attention that the system still indicated he had been on a FAM trip. *See* HT (appellant) at 151. The administrative judge concluded that the appellant's explanation was not credible, particularly in light of his admission that "FAM trips are a privilege and I abused it." IAF, Tab 22 at 3, *citing* IAF, Tab 7, subtab 3 at 88.

¶7 We note that there was testimony from the appellant and other agency witnesses regarding the problems in the agency's Cru Art system. *See* HT (Miller) at 134 (acknowledging that there were problems with the time-keeping system and that it was "possible" that the appellant could have thought that he changed his time but that the system did not accurately reflect that change or that he entered the wrong code); HT (appellant) at 147; HT (Bing) at 180-82 (describing some of the problems with the Cru Art system). However, there was no evidence of any such problems on the date in question. Based on the appellant's admission that he did not attend FAM training and the documentary evidence, we discern no error with the administrative judge's decision to sustain this charge.

The administrative judge properly sustained the conduct unbecoming a manager charge.

¶8 The administrative judge did not sustain specifications 6 and 7 of this charge,[1] IAF, Tab 22 at 5, and neither party challenges this conclusion on PFR. Therefore, we need not address these specifications on review.

¶9 Specifications 3 and 5 relate to the agency's requirement that the appellant maintain "currency," meaning that he must actually participate in air traffic control for a certain number of hours each month. *See* IAF, Tab 7, subtab 4o at 1 (describing the air traffic currency requirements for supervisors). With respect to Specification 3, the agency alleged:

> On Wednesday, February 28, 2007, you signed on position D66 at 2203 UTC[2]. At 2206 UTC, you called another sector to discuss routing on FIV342. At 2247 UTC, you completed a position relief briefing (PRB). However, between 2216 and 2246 UTC, several shout line calls came into your sector. Since you were signed on to this sector, you should have responded to these calls. These calls were answered by someone else. At 2248 UTC, you signed on position at D65. However, from 2248 until 2330 UTC, on D65, the air to ground communications were not being monitored. At 2341 UTC, you answered a shout line call. However, at 2347 UTC, another shout line call came in. Since you were signed on to this sector, you should have responded to this call. The call was answered by the R65 controller. Other controllers covered your position until 0059 when air to ground communications were no longer monitored. Upon leaving the area, you were responsible to sign off from the position. In addition, by staying signed on [to] these positions, you were misrepresenting system records by having it logged that you were actually working (getting currency) as required by FAA Order 7210.3U when in actuality you were not performing the duties of the position in which you were officially signed in.

IAF, Tab 7, subtab 4a at 2.

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[1] These specifications described statements that the appellant allegedly made that showed a lack of respect for subordinate employees. IAF, Tab 7, subtab 4a at 3-4.

[2] "UTC" means universal coordinated time. HT (Leonard) at 52.

¶10 In specification 5, the agency alleged that, on March 23, 2007, at 1951 UTC he was plugged into D65, and between 1951 and 2031 UTC, he did not answer shout line calls; it was discovered that he had configured the position to monitor the wrong sector, a mistake that he would have recognized "immediately" if he was in the area, but he did not correct the mistake until he returned at 2031 UTC. *Id.* The agency further alleged that he was misrepresenting system records by claiming currency when he was not really present. *Id.* at 2-3.

¶11 The agency's evidence for these specifications is circumstantial. With respect to specification 3, Operations Supervisor Patti Roberts testified that she signed the appellant off of a currency time position because he was gone for about 15 to 20 minutes, HT (Roberts) at 28-29; but, she admitted that she did not know the date that she signed him off, *id.* at 35. However, Linda Corby-Leonard, East Area First Line and Front Line Manager, testified that Ms. Roberts signed him out sometime at the end of February 2007. HT (Corby-Leonard) at 17-21.

¶12 George Leonard, Safety Assurance Supervisor, reviewed the voice recordings from February 28, 2007, and determined that, between 22:02 and 22:47 there was "[n]o conclusive evidence that [the appellant] was not at the position." IAF, Tab 12, Exhibit 1 at 1. During his testimony, Mr. Leonard stated on cross-examination that the evidence showed "[b]etween 22:02 and 22:47 . . . [the appellant] was in fact at the sector." HT (Leonard) at 65. However, we note that Mr. Leonard admitted that he did not interview anyone who was present on February 28, 2007. *Id.* at 66. Sharon Hyzer, Support Manager for Safety Assurance, also reviewed this evidence, noted that the "lapses are suspect," and the "evidence is circumstantial," but she concluded that "[t]here is no way for sure of determining whether [the appellant] was actually performing [his] duties or not." IAF, Tab 12, Exhibit 1 at 11. Mr. Miller also testified he did not interview other Controllers who may have been present when the appellant was accused of misstating his currency time because he "did not want to involve the

rank and file Controllers." HT (Miller) at 139. In fact, Mr. Miller admitted, rather inartfully, that "[t]here [was] no inconclusive data that would prove that [the appellant] was there or not there" regarding the allegation in specification 3. *Id.* at 86.

¶13 With respect to specification 5, we note that Ms. Hyzer stated that there was "every reason to believe" that the appellant was not at his position from 1950[3] to 2031 UTC, but that "without an eye witness account, or [the appellant's admission], there is no way to absolutely prove" this allegation. IAF, Tab 12, Exhibit 1 at 12. Indeed, Mr. Miller admitted that he did not interview anyone who was in the room at the time the appellant was allegedly improperly obtaining currency on March 23, 2007. HT (Miller) at 120.

¶14 However, this was not the only agency evidence for these specifications. As discussed above, the appellant admitted in his April 20, 2007 statement that "[g]etting credit time on position and not being there was unfair to others." IAF, Tab 7, subtab 3 at 88. We interpret this statement as an admission regarding the facts underlying specifications 3 and 5, and coupled with the agency's evidence, we conclude that the agency sustained its burden with respect to these specifications.

¶15 We also wish to briefly discuss specification 4, which alleged that, on February 28, 2007, the appellant called Operations Supervisor Johnny Schetrompf to find out how long he "had been plugged into D65," during this conversation, he learned that Ms. Roberts "signed [him] out," he called Ms. Roberts and Ms. Corby-Leonard "those [f------] girls," and the agency said that such language was inappropriate. IAF, Tab 7, subtab 4a at 2. This allegation was apparently based on information that Mr. Schetrompf gave to Mr. Miller, *see* HT (Miller) at 83; however, other than Mr. Miller's hearsay testimony, there is absolutely no

[3] We note that the agency charged the appellant with misrepresenting currency starting at 1951 UTC; however, this distinction is not relevant to our analysis.

evidence in the record to support this allegation. We note that Mr. Schetrompf did not testify. There is a written statement from him, signed April 18, 2007, but it did not identify any dates or even reference a specific conversation with the appellant regarding how long he had been plugged in to D65, and it only stated, relevant to these allegations, that the appellant has said, "on a few occasions, '[F---] the girls!' [r]eferring to Patti Roberts and Linda Corby-Leonard." IAF, Tab 7, subtab 4h. We note that the appellant initially denied making the statement, *see* IAF, Tab 7, subtab 4i at 1, but then, after subsequently speaking with Mr. Schetrompf, he said that it was possible that he made the statement, but that he did not recall making it. HT (appellant) at 156-58.

¶16 Having reviewed this evidence, and the appellant's April 20, 2007, admission that "the statement that was made was uncalled for," the administrative judge sustained this specification. IAF, Tab 22 at 4, *citing* IAF, Tab 7, subtab 3 at 88. We disagree. We note that the appellant's "admission" did not identify any particular statement, and three separate statements were alleged to be improper in the agency's notice, two of which were not sustained by the administrative judge. Therefore, we cannot discern to *which* statement the appellant was referring. Moreover, in the absence of any evidence whatsoever that the appellant stated "those [f------] girls" on the date in question, we cannot conclude that the agency met its burden with respect to specification 4 and we do not sustain it.

¶17 However, we conclude that Charge 2 was properly sustained based on our determinations regarding specifications 3 and 5. *See Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990) (where more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge). Accordingly, we need not consider whether the administrative judge properly sustained specifications 1 and 2.

The administrative judge properly sustained the lack of candor charge.

¶18 Lack of candor is a broader and more flexible concept than falsification, and as such, its contours and elements depend on the particular context and conduct involved. It may involve a failure to disclose something that, under the circumstances, should have been disclosed to make a statement accurate and complete. *Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002).

¶19 Specification 1 of this charge alleged that the appellant originally denied calling Ms. Roberts and Ms. Corby-Leonard "those [f------] girls," but he later indicated that he may have said it, but he did not recall saying it. IAF, Tab 7, subtab 4a at 3. Since we conclude that the agency failed to demonstrate that the appellant called them "those [f------] girls" on the date in question, we cannot conclude that his subsequent statement evinces a lack of candor. Accordingly, we do not sustain specification 1 of this charge.

¶20 Specification 2 of this charge relates to specification 3 of Charge 2. It alleged that during a March 21, 2007 official inquiry, the appellant stated that he did not sign onto a sector to get currency and then leave, except for bathroom breaks, but that, on February 28, 2007, Ms. Roberts signed him off of his D65 position because he was not present. *Id*. We note that the appellant claimed, during the official inquiry, that he did not sign on for currency and then leave, except to go to the bathroom. IAF, Tab 7, subtab 4i at 1. However, in light of our recommendation to sustain specification 3 of Charge 2, *see supra* at pp. 6-8, we conclude that the agency demonstrated the appellant's lack of candor during the investigation and we sustain this specification. *See Boyd v. Department of Justice*, 14 M.S.P.R. 427, 428-30 (1983) (when an underlying misconduct charge has been proven, a lack of candor charge must also be sustained based on appellant's failure to respond truthfully or completely when questioned about matters relating to the proven misconduct). We also conclude that it is proper to

sustain Charge 3 based on our recommendation that this specification should be sustained. *Burroughs*, 918 F.2d at 172.

The administrative judge properly rejected the appellant's race discrimination claim.

¶21 The appellant alleged below that he was disparately treated because of his status as an African-American. IAF, Tab 13 at 9-10. We note that during the hearing, the appellant and some other agency witnesses discussed Mr. Irizarry, another Supervisory Air Traffic Control Specialist, who was alleged to have committed similar misconduct regarding currency; however, at the time of the hearing, the agency had not proposed any disciplinary action against him.

¶22 In its notice of a proposed 30-day suspension, the agency charged Mr. Irizarry with misrepresenting information on government records based on a single specification that, on two occasions on May 17, 2008, he signed onto a position to obtain currency, but he did not actually work in that position. IAF, Tab 18 at 3. The notice stated that Mr. Irizarry admitted to this allegation and further "admitted to signing on positions in June and July 2008 without actually working the positions for a total of 2 – 3 hours each month." *Id.* at 3-4. We note that there was no evidence in the record below, or on PFR, regarding the agency's penalty determination.

¶23 The appellant has the burden of proving his affirmative defense of race discrimination by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(iii). An employee may establish a *prima facie* case of prohibited discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly situated to an individual who was not a member of the protected group, and he was treated more harshly or disparately than the individual who was not a member of his protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). The Board has held that for other employees to be deemed similarly situated, all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the

comparator employees, including that they report to the same supervisor, are subject to the same disciplinary standards, and engaged in similar misconduct. *Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 13 (2003). However, where the record is complete and a hearing has been held,[4] it is unnecessary to follow the traditional burden-shifting order of analysis; rather, the inquiry shifts from whether the appellant has established a *prima facie* case to whether s/he has demonstrated by a preponderance of the evidence that the agency's reason for its actions was a pretext for discrimination. *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 52 (1998).

¶24 The only evidence in the record regarding Mr. Irizarry's race arose during Mr. Miller's cross-examination:

> Q Mr. [Irizarry] is not African/American?
>
> A No.

HT (Miller) at 130. We note, however, that Jose A. Garcia was the proposing and deciding official in Mr. Irizarry's case, *see* IAF, Tab 18 at 3-5, not Mr. Miller. Moreover, there was no evidence in the record regarding Mr. Garcia's knowledge of Mr. Irizarry's race, and we could not find any identification of Mr. Irizarry's race in the record.

¶25 In any event, the administrative judge rejected the appellant's affirmative defense, concluding that "differences in charges are many," the appellant and Mr. Irizarry were not similarly situated, and the appellant did not show that he was treated differently regarding the imposition of discipline. IAF, Tab 22 at 6. While there are similarities between the appellant's case and Mr. Irizarry's case,

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[4] We note that this is a somewhat unusual situation, in that the parties were aware of Mr. Irizarry's alleged misconduct at the hearing, there was testimony regarding his case, but no meaningful comparisons could be made because the agency had not yet proposed any discipline. However, such circumstances do not affect our conclusions herein.

we agree with the administrative judge that the appellant did not meet his burden with respect to his race discrimination claim.

¶26 For instance, the appellant and Mr. Irizarry were both Supervisory Air Traffic Controllers at the Jacksonville Center. IAF, Tab 18 at 3. They also had the same third line supervisor, Mr. Miller. HT (Miller) at 131. Significantly, even though their respective charges had different labels – the appellant was charged with conduct unbecoming a manager, and Mr. Irizarry was charged with misrepresenting information on government records – they both were essentially disciplined for claiming currency when they were not actually at work in the position.

¶27 However, there were significant differences between these two cases, mainly that the appellant was *additionally charged* with AWOL and lack of candor. Furthermore, Mr. Irizarry, during the investigation, immediately admitted his wrongdoing, and he also admitted to improperly claiming currency for an additional period of time, whereas the appellant denied the allegations and, after the agency expended its resources to investigate these allegations, he later admitted to most of the misconduct. We note, too, that there were different proposing and deciding officials.

¶28 For these reasons, we believe that the appellant and Mr. Irizarry were not similarly situated. Moreover, we note that Mr. Miller was asked whether the appellant's race played a role, if any, in his decision to demote him and he responded "[a]bsolutely none." HT (Miller) at 142. The appellant bears the burden of proving his affirmative defense, and based on the evidence, we

conclude that he failed to show that he was disparately treated because of his race.[5]

Penalty

¶29 The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). When all of the agency's charges are sustained, but some of the underlying specifications are not sustained, the agency's penalty determination is entitled to deference and should be reviewed only to determine whether it is within the parameters of reasonableness. *Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650 (1996). The Board's function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management's judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Kamahele v. Department of Homeland Security*, 108 M.S.P.R. 666, ¶ 11 (2008); *Douglas*, 5 M.S.P.R. at 306.

¶30 We note that Mr. Miller considered the appellant's response to the notice of proposed demotion, which denied most of the allegations, as well as his April 20, 2007 statement, wherein he admitted most of the allegations. IAF, Tab 7, subtab

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[5] We note that there are some irregular aspects of Mr. Irizarry's case related to the appellant's race discrimination claim. For instance, Mr. Irizarry's conduct occurred in May 2008, yet the agency did not issue the proposal notice until over 7 months later, in January 2009, which was also 1 week after the hearing in this appeal. In the appellant's case, the agency investigated the allegations and proposed his demotion within 4 months of the alleged misconduct. IAF, Tab 7, subtab 4b. Moreover, Mr. Garcia testified in his September 2008 deposition that Mr. Miller would be the deciding official in Mr. Irizarry's case, IAF, Tab 20 at 18; however, between then and January 2009, Mr. Garcia apparently became the proposing and deciding official, and the agency did not provide an explanation for why Mr. Miller was no longer the deciding official in that case. However, we are not persuaded that these concerns warrant a different conclusion regarding the appellant's race discrimination claim.

4c; *see* HT (Miller) at 106 ("He refuted everything that we had charged him with, yet on the other hand, [in] the letter I gave back to him he admitted everything that we charged him with."). Mr. Miller also considered many critical *Douglas* factors. He noted that the offenses were serious, and that the appellant was a Supervisor, which means he was held to a higher standard. IAF, Tab 7, subtab 4c at 5-6. He also considered that the appellant did not accept responsibility or "demonstrate[] . . . a genuine remorsefulness." *Id*. at 5. Mr. Miller further considered the appellant's "over 15 years of service with this agency," his past work record and length of service as an Air Traffic Controller, which he described as "satisfactory." *Id.* at 6. Mr. Miller also implied that he lost confidence in the appellant's "ability to restore and rebuild the trust which has been lost," which was why he did not believe a suspension was appropriate. *Id.* at 5. Mr. Miller also responded to the appellant's contention that the demotion was not consistent with the treatment of other supervisors in the past, and he noted that the circumstances in the proposal notice were unique and that he evaluated such cases on a case-by-case basis. *Id.*

¶31 Additionally, Mr. Miller indicated that he relied on the agency's table of penalties. *Id.* We note that the penalty for a first offense of unauthorized absence without leave from the work site during duty hours, like the AWOL charge, ranges from a reprimand to a 5-day suspension, and the penalty for a first offense of "[p]roviding/making false, misleading, untruthful statements . . . in connection with any official inquiry, investigation, etc.," like the lack of candor charge, ranges from a 10-day suspension to removal. IAF, Tab 7, subtab 4v at 1, 3. Although the table of penalties did not identify an offense similar to the charge of conduct unbecoming a manager, the demotion penalty falls within the given range for the two other sustained charges taken together.

¶32 Based on our review of the record, we conclude that, given the multiplicity of charges, the serious nature of each of the charges, the appellant's status as a

supervisor,[6] his admissions regarding his misconduct, and Mr. Miller's proper consideration of the relevant *Douglas* factors, the administrative judge properly affirmed the demotion penalty. *See, e.g., Lowe v. Department of Justice*, 63 M.S.P.R. 73, 76-79 (1994) (sustaining charges of conduct unbecoming a supervisor, resulting from sexual harassment, and failure to follow an order; noting that they are serious charges, and that the appellant, as a supervisor, was responsible for maintaining a work environment free of sexual harassment; and concluding that, despite "otherwise good service record," a demotion to a GS-8 nonsupervisory position was a reasonable penalty).

¶33 For these reasons, we affirm the initial decision as modified by this Opinion and Order.

ORDER

¶34 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

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[6] The Board has determined that supervisors may be held to a higher standard of conduct. *See Martin v. Department of Transportation*, 103 M.S.P.R. 153, ¶ 13 (2006) ("Agencies are entitled to hold supervisors, like the appellant, to a higher standard of conduct than non-supervisors because they occupy positions of trust and responsibility."), *aff'd*, 224 F. App'x 974 (Fed. Cir. 2007).

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other

issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.